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QUASI-CONTRACT, ITS NATURE AND SCOPE.

IT is usual to divide contracts into three classes, —

1. Simple contracts.
2. Contracts under seal.
3. Contracts of record.

Where this classification is made, simple contracts are subdivided into

1. Express contracts.
2. Contracts implied in fact.
3. Contracts implied in law.

In this classification of contracts, obligations of a quasi-contractual nature are treated either as simple contracts or as contracts of record.

This treatment of quasi-contract is, in the opinion of the writer, not only unscientific, and therefore theoretically wrong, but is also destructive of clear thinking, and therefore vicious in practice.

It needs no argument to establish the proposition that it is not scientific to treat as one and the same thing an obligation that exists in every case because of the assent of the defendant, and an obligation that not only does not depend in any case upon his assent, but in many cases exists notwithstanding his dissent. And yet with this wide difference between simple contracts and quasi-contracts, the latter are generally treated to-day as a species of simple contract.

Equally objectionable in principle, though perhaps not so misleading in practice, is the classification of such quasi-contracts as cannot by any possibility be treated as simple contracts, as contracts of record.

A true contract, whether it be a simple contract, a specialty, a contract in the nature of a specialty, or a contract of record, exists as an obligation, because the contracting party has *willed*, in circumstances to which the law attaches the sanctification of an obligation, that he should be bound. Had he not so willed, he would not be under a contractual obligation. This statement is as true of a contract implied in fact as of an express contract. Indeed, the division of simple contracts into "express contracts" and "contracts implied in fact" does not involve a consideration of the principles of contracts at all.[1]

In the case of a contract implied in fact, as much as in the case of an express contract, the plaintiff must prove that the defendant either made or accepted an offer which resulted in a promise on the defendant's part, and that the promise was not only in fact made, but that a sufficient consideration was given therefor. If the defendant gave in words a promise containing all the terms of the contract which the plaintiff claims that he made, for a consideration expressly requested in words by him, in exchange therefor, then the contract is an express contract. Thus, if A should say to B: "I will promise to sell you my horse X for the sum of $500 in cash if you will promise to purchase on these terms," and B should so promise, an express contract would be thereby created. Suppose, however, that A should write to a livery-keeper, simply requesting him to send a coupé to his house at a certain hour, and the coupé was sent and used by A, there would certainly be no express contract in such a case, since A has never in words said that he intended to assume any obligation in favor of B. And yet A's conduct speaks quite as loudly as words, and leaves no doubt of his intention to enter into a contract with B for the use of the coupé. No one would question that A has communicated such an intention to B, and that he can be fairly said to have promised to pay him for the use of his property, and that to allow the defendant to escape liability would defeat the intention of the parties quite as much as to allow the defendant to refuse to be bound by his contract to sell the horse in the case first supposed.

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[1] Marzetti *v.* Williams, 1 B. & Ad. 415; Hertzog *v.* Hertzog, 29 Pa. St. 465.

The difference between the cases is a difference simply in the kind of the evidence used to establish the contract. In the one case the language of contract is in terms used, and because of the expressions used the contract is called an express contract; whereas in the other case the contract is established by the conduct of the parties, viewed in the light of surrounding circumstances.

The terms "express contracts" and "contracts implied in fact" are used then to indicate, not a distinction in the principles of contract, but a difference in the character of the evidence by which a simple contract is proved. The source of the obligation in each case is the intention of the parties.

The phrase "contract implied in law" is used, however, to denote, not the nature of the evidence by which the claim of the plaintiff is to be established, but the source of the obligation itself. It is a term used to cover a class of obligations where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and in many cases in spite of his actual dissent.

The identity in principle of express contracts and contracts implied in fact, and the distinction between a genuine contract, whether express or implied in fact, and a quasi-contract, commonly called a contract implied in law, is thus stated by Maine in his "Ancient Law:"[1] —

"The part of Roman law which has had most extensive influence on foreign subjects of inquiry has been the law of Obligation, or, what comes nearly to the same thing, of Contract and Delict. The Romans themselves were not unaware of the offices which the copious and malleable terminology belonging to this part of their system might be made to discharge, and this is proved by their employment of the peculiar adjunct *quasi* in such expressions as Quasi-Contract and Quasi-Delict. 'Quasi,' so used, is exclusively a term of classification. It has been usual with English critics to identify the quasi-contracts with implied contracts; but this is an error, for implied contracts are true contracts, which quasi-contracts are not. In implied contracts, acts and circumstances are the symbols of the same ingredients which are symbolized, in express contracts, by words; and whether a man employs one set of symbols or the other must be a matter of indifference so far as concerns the theory of agreement. But a quasi-contract is not a contract at all. The commonest sample of the class is the relation subsisting between two persons, one of whom has paid money to the other through mistake.

[1] 4th ed. 343–346.

The law, consulting the interests of morality, imposes an obligation on the receiver to refund; but the very nature of the transaction indicates that it is not a contract, inasmuch as the convention, the most essential ingredient of contract, is wanting. This word 'quasi,' prefixed to a term of Roman law, implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted by a strong superficial analogy or resemblance. It does not denote that the two conceptions are the same, or that they belong to the same genus. On the contrary, it negatives the notion of an identity between them; but it points out that they are sufficiently similar for one to be classed as the sequel to the other, and that the phraseology taken from one department of law may be transferred to the other, and employed without violent straining, in the statement of rules which would otherwise be imperfectly expressed."

Notwithstanding the existence and recognition of this well-defined line of demarcation between genuine contracts, whether express or implied, and quasi-contracts, there exists the greatest confusion in the application thereof in practice. Thus Blackstone confuses contracts implied in fact and quasi-contracts, when he says:[1]—

"This contract or agreement may be either express or implied. *Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten load of timber, or to pay a stated price for certain goods. *Implied*, are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform. As if I employ a person to do any business for me, or perform any work; the law implies that I undertook, or contracted, to pay him as much as his labor deserves. If I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value."

While this definition of an implied contract is, at best, true only of quasi-contracts, all the cases put are illustrations of contracts implied in fact. Mr. Justice Lowrie, referring to the language just quoted from Blackstone, properly says:[2]—

"There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an express one.

[1] 2 Bl. Com. 443.

[2] Hertzog *v.* Hertzog, 29 Pa. St. 465, 467.

When it is not expressed, it may be inferred, implied, or presumed, from circumstances as really existing; and then the contract, thus ascertained, is called an implied one. The instances given by Blackstone are an illustration of this.

"But it appears in another place, 3 Comm. 159–166, that Blackstone introduces this thought about reason and justice dictating contracts, in order to embrace, under this definition of an implied contract, another large class of relations which involve no intention to contract at all, though they may be treated as if they did. Thus, whenever, not our variant notions of reason and justice, but the common sense and common justice of the country, and therefore the common law or statute law, impose upon any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. Thus out of torts grows the duty of compensation, and in many cases the tort may be waived, and the action brought in *assumpsit*.

"It is quite apparent, therefore, that radically different relations are classified under the same term; and this must often give rise to indistinctness of thought. And this was not at all necessary; for we have another well-authorized technical term exactly adapted to the office of making the true distinction. The latter class are merely *constructive* contracts, while the former are truly implied ones. In one case, the contract is mere fiction, — a form imposed in order to adapt the case to a given remedy; in the other, it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty."

Yet the learned Justice, after so intelligently criticising Blackstone, falls into the same confusion of statement when he says, in the same opinion :[1] —

"The law ordinarily presumes or implies a contract whenever this is necessary to account for other relations found to have existed between the parties.

"Thus if a man is found to have done work for another, and there appears no known relation between them that accounts for such service the law presumes a contract of hiring. But if a man's house takes fire, the law does not presume or imply a contract to pay his neighbors for their services in saving his property. The common principles of human conduct mark self-interest as the motive of action in the one case, and kindness in the other; and therefore, by common custom, compensation is mutually counted on in one case, and in the other not."

[1] Hertzog *v.* Hertzog, 29 Pa. St. 465, 468.

Plainly, in the case put by Mr. Justice Lowrie, the inference of a contract is one of fact; and in another part of the same opinion the learned Justice clearly regards the inference as one of fact and not one of law, when he says :[1] —

"Every induction, inference, implication, or presumption in reasoning of any kind, is a logical conclusion derived from and demanded by certain data or ascertained circumstances. If such circumstances demand the conclusion of a contract to account for them, a contract is proved; if not, not. If we find, as ascertained circumstances, that a stranger has been in the employment of another, we immediately infer a contract of hiring, because the principles of individuality and self-interest, common to human nature, and therefore the customs of society, require the inference."

In the opinion of Lord Justice Lindley, it was the failure of Lord Justice Brett to recognize the distinction in question, which led him to doubt[2] that a lunatic was liable for necessaries furnished to him, by one knowing of his lunacy. On this point Lord Justice Brett expressed himself as follows : —

"A question has been flushed, if I may use the word, in this case which it is not necessary to decide, namely, whether if a person supplies necessaries to a lunatic, knowing of the lunacy at the time, a contract on the part of the lunatic to pay for them can be implied. I give no opinion upon that point. It has not been fully argued to-day, and it appears to me to involve a very difficult point of law, which I do not think has ever been settled by authority. For my part I should doubt whether in favor of a person who knows of the lunacy you can imply a contract to pay for a supply of necessaries to a lunatic."

In Rhodes *v.* Rhodes,[3] Lord Justice Lindley, referring to the doubt raised by Lord Justice Brett, said : —

"The question whether an implied obligation arises in favor of a person who supplies a lunatic with necessaries is a question of law, and *In re* Weaver, a doubt was expressed whether there is any obligation on the part of the lunatic to repay. I confess I cannot participate in that doubt. I think that that doubt has arisen from the unfortunate terminology of our law, owing to which the expression 'implied contract' has been used to denote, not only a genuine contract established by inference, but also an obligation which does not arise from any real contract,

[1] Hertzog *v.* Hertzog, 29 Pa. St. 465, 469.

[2] *In re* Weaver, 21 Ch. D. 615-620.

[3] 44 Ch. D. 94, 107.

but which can be enforced as if it had a contractual origin. Obligations of this class are called by civilians *obligationes quasi ex contractu.*"

It was this confusion of ideas that caused the counsel in Sceva *v.* True,[1] to contend, that as an insane person was not able to contract, the defendant was not liable for necessaries furnished to her by one knowing her to be insane. The counsel's argument in that case was as follows : —

"The foundation principle of the entire law of contract is, that the parties must have the capacity to contract, and must actually exercise their faculties by contracting. Here there was no capacity, for there was but one mind ; no contract was made, and no attempt was made to make one. The two vital facts, without which no contract, tacit or express, can exist, — capacity and its exercise, — are wanting. Was there an implied contract? What does that term mean? In thousands of cases, in the books, we know just what it means. The parties have capacity to contract ; facts, circumstances, few or many, clear or complicated, exist, which lead the minds of the jurors to the conclusion that the minds of the parties met. Minds may meet by words, acts, or both. The words even may negative such meeting ; but 'acts which speak louder than words' may conclude him who denies a tacit contract. Aside from cases where the capacity to contract is wanting, no instance now occurs to us in which the implied contract cannot be supported upon these principles, and the familiar doctrines of waiver and estoppel. . . . It is another fundamental principle that no one, by voluntarily performing services for another, can make the other his debtor. If these principles apply to cases where the contracting mind is wanting, they settle this case. We know it is sometimes said, in such a case, 'the law will imply a contract.' What does that mean? As it seems to us, only this : that where A, who has capacity to contract, furnishes B, who is totally destitute of such capacity, what is proper for B to have, the judges will turn the bench into a broker's board, will substitute themselves for B, make a contract where none existed, cause it to relate back to the voluntary acts of A, and then sit in judgment upon and enforce their own contract. It is a perversion of language to call such a performance a contract of any kind. It is judicial usurpation. The Constitution gave the court no such power. The court has no power to make contracts for people : it can only infer one where a jury might."

To this argument the court made the following conclusive answer : —

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[1] 53 N. H. 627.

"We regard it as well settled by the cases referred to in the briefs of counsel, many of which have been commented on at length by Mr. Shirley for the defendant, that an insane person, an idiot, or a person utterly bereft of all sense and reason by the sudden stroke of accident or disease, may be held liable, in assumpsit, for necessaries furnished to him in good faith while in that unfortunate and helpless condition. And the reasons upon which this rests are too broad, as well as too sensible and humane, to be overborne by any deduction which a refined logic may make from the circumstances that in such cases there can be no contract or promise in fact, no meeting of the minds of the parties. The cases put it on the ground of an implied contract; and by this is not meant, as the defendant's counsel seems to suppose, an actual contract, — that is, an actual meeting of the minds of the parties, an actual mutual understanding, to be inferred from language, acts, and circumstances, by the jury, — but a contract and promise, said to be implied by the law, where, in point of fact, there was no contract, no mutual understanding, and so no promise. The defendant's counsel says it is usurpation for the court to hold, as matter of law, that there is a contract and a promise, when all the evidence in the case shows that there was not a contract, nor the semblance of one. It is doubtless a legal fiction, invented and used for the sake of the remedy. If it was originally usurpation, certainly it has now become very inveterate, and firmly fixed in the body of the law."[1]

Not only has this identification in classification of quasi-contracts with genuine contracts led to a confusion of ideas, but it has also rendered the interpretation of written laws or statutes exceedingly difficult where the word "contract" is used; thus, for example, in Dusenbury *v.* Speir,[2] the legality and arrest turned upon the meaning to be given to the phrase "contract express or implied," as used in statutes regulating arrests in civil actions. The plaintiff had been arrested in an action, corresponding to the common-law action, of money had and received, brought to recover money which the plaintiff, the defendant in that action, had fraudulently obtained. The plaintiff was arrested on a warrant issued on the theory that the action was that of contract, express or implied, within the meaning of the statute. It was held that his liability was in quasi-contract, and not in contract, and that as the phrase "contract express or implied" was used in the statutes with reference solely to genuine contracts, the arrest was illegal, and the judgment of

[1] Illustrations of this confusion of ideas might be multiplied indefinitely; but it seems unnecessary to cite them here, as further illustrations will be offered in the discussion of the scope of quasi-contract.

[2] 77 N. Y. 144.

the lower court was reversed. And yet the court, whose judgment was reversed by the Court of Appeals, recognized as fully as did the Court of Appeals that the obligation to return the money was a quasi-contractual, and not a contractual, obligation.[1]

In O'Brien *v.* Young,[2] the question involved was the construction of the statute reducing the rate of interest from seven per cent to six per cent. The statute contained a clause excepting from its operations "any contract or obligation made before the passage of this Act." It was contended that a judgment obtained before the passage of the Act was exempted from its operations, and that the judgment creditor was, therefore, entitled to six per cent interest. But the court reversed the judgment of the lower court, holding that the clause in question referred, not to quasi-contracts, but to genuine contracts only, and that, therefore, the judgment creditor was entitled to only six per cent after the passage of the Act.

But in The Gutta Percha Shoe Co. *v.* Mayor, etc.,[3] it was held that although a judgment was not a genuine contract, yet an

[1] Probably no clearer statement of the distinction between a genuine contract and a quasi-contract can be found than is contained in the following statement, taken from the opinion of Mr. Justice Danforth in this case: —

"We cannot agree with the learned judge in this construction of the statute. On the contrary, we think that the express contract referred to in the statute is one which has been entered into by the parties, and upon which, if broken, an action will lie for damages, or is implied, when the intention of the parties, if not expressed in words, may be gathered from their acts and from surrounding circumstances; and in either case must be the result of the free and *bona fide* exercise of the will, producing the *aggregatio mentium*, the joining together of two minds, essential to a contract at common law. There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability, similar to the rights and liabilities in certain cases of express contract. Thus, if one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrong-doer to restore it to the rightful owner, although it is obvious that is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and in fact are not contracts at all. And a somewhat similar distinction is recognized in the civil law, where it is said: 'In contracts it is the consent of the contracting parties which produces the obligation; in quasi-contracts there is not any consent. The law alone, or natural equity, produces the obligation by rendering obligatory the fact from which it results. Therefore these facts are called quasi-contracts, because, without being contracts, they produce obligations in the same manner as actual contracts.'"

[2] 95 N. Y. 428.

[3] 108 N. Y. 276.

attachment could issue in an action brought on a foreign judgment under a section of the code of civil procedure, allowing an attachment against property, in an action brought for "breach of contract, express or implied, other than a contract to marry." Yet the same court held, in Remington Paper Co. *v.* O'Dougherty,[1] that the attachment could not issue under the same section of the code, in an action brought to enforce a statutory liability created by the Legislature of New York to pay the cost of an action.

The question naturally arises, why a classification productive of so much confusion was ever adopted. The answer to this question is to be sought, not in the substantive law, but in the law of remedies.

The only forms of action known to the common law were actions of tort and contract. If the wrong complained of would not sustain an action, either in contract or tort, then the plaintiff was without redress, unless the facts would support a bill in equity.[2]

Although from time to time the judicial view of substantive rights broadened under the leavening effect of equity and other considerations, the broadening process did not lead to the creation of remedies sounding in neither contract nor tort. The judges attempted, however, by means of fictions, to adapt the old remedies to the new rights, with the result usually following the attempt to put new wine into old bottles. Thus, largely through the action of assumpsit, that portion of the law of quasi-contract usually considered under the head of simple contracts, was introduced into our law.

In the action of assumpsit, as the word assumpsit implies, whether it be special or indebitatus assumpsit, a promise must always be alleged,[3] and at one time it was an allegation which had to be proved.[4] It was only natural, therefore, that the courts in using a purely contractual remedy to give relief in a class of cases possessing none of the elements of contract should have resorted to fictions to justify such a course. This was done in the extension of assumpsit to quasi-contract; and the insuperable difficulty of proving a promise where none existed was met by the statement that "the law implied a promise." The statement that the *law imposes the*

[1] 96 N. Y. 666, affirming 32 Hun, 255.

[2] 1 Spence, Eq. Jur. 243; Wood *v.* Ayres, 29 Mich. 345; Sceva *v.* True, 53 N. H. 627.

[3] Chitty on Pleading, 301.

[4] Ames, The History of Assumpsit, 2 Harv. Law Rev. 64.

obligation would not have met the difficulties of the situation, since the action of assumpsit presupposed the existence of a promise. The fiction of a promise was adopted then in this class of cases solely that the remedy of assumpsit might be used to cover a class of cases where, in fact, there was no promise.

It might be asked why did the court extend to this class of obligations the remedies peculiar to contracts, rather than the remedies peculiar to tort. The right conferred in quasi-contract, and the right, the violation of which constitutes a tort, undoubtedly possess this common characteristic, that the obligation is imposed by operation of law, regardless of the consent of the defendant. But treating a tort as the violation of a right *in rem*, the obligations differ in an important particular; for while to avoid committing a tort, one need only forbear,[1] to discharge the obligation imposed by quasi-contract, one must act.[2] It is true that the obligation imposed by a contract may be simply to forbear; but the obligation most generally assumed under a contract requires one to act, and therefore contract rather than tort would naturally suggest an analogy. Another consideration would also suggest the analogy of contract rather than of tort; not only in most cases where a quasi-contractual contract is imposed has the defendant not acted in violation of a right *in rem*, in consequence of which the law could impose an obligation, but in many cases he has either not acted at all, as, for example, where one, in the absence of a husband, who is ignorant of the death of his wife, defrays the funeral expenses, or, if he has acted, has acted with the consent and perhaps the co-operation of the plaintiff; as, for example, where a plaintiff pays money under mistake to a defendant, who shares in the mistake made by the plaintiff.

It remains to consider the scope of quasi-contract.[3]

Quasi-contracts may be said in general to be founded,[4] —

1. Upon a record.
2. Upon a statutory, or official, or customary duty.

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[1] Austin, Jurisprudence, Lect. XIV.

[2] Illustrations of this proposition will be given in discussing the scope of the obligation.

[3] No attempt will be made in this connection to do more than classify the liabilities recognized as obligations existing in law. The writer reserves for separate treatment the consideration of the facts that should exist in any given case to entitle one to recover on principles of quasi-contract.

[4] Ames, The History of Assumpsit, 2 Harv. Law Rev. 64.

3. Upon the doctrine that no one shall be allowed unjustly to profit or enrich himself at the expense of another.

The obligation created by a judgment, which, as Sir William Anson has said, is unfortunately styled a contract of record in English law, resting, not upon the agreement of the parties, but regardless thereof, is a quasi-contractual, and not a contractual obligation.[1] In Louisiana *v.* New Orleans,[2] Mr. Justice Field, delivering the opinion of a court, in support of the decision that a judgment was not a contract within the meaning of that word as used in the clause of the Constitution forbidding the passing of a law by a State impairing the obligation of a contract, said: —

"A judgment for damages, estimated in money, is sometimes called by text-writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered; and by a fiction of law a promise to pay is implied where such legal obligation exists. It is on the principle that an action *ex contractu* lies upon a judgment. But this fiction cannot convert a transaction wanting the consent of parties into one which necessarily implies it."

A statutory obligation resting, not upon the consent of the parties, is clearly quasi-contractual in its nature.[3] In Steamship Co. *v.* Joliffe,[4] Mr. Justice Field, in discussing the nature of the claim for half-pilotage fees under a statute allowing such fees, where a pilot's services are offered and declined, thus distinguishes between a contract liability and a liability imposed by statute: —

"The transaction in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi-contract.* The absence of assent on the part of the master or owner of the vessel does not change the case. In that large class of transactions designated in the law as implied contracts, the assent or convention which is an essential ingredient of an actual contract is often wanting . . .

"The claim of the plaintiff below for half-pilotage fees resting upon a transaction regarded by the law as *quasi* contract, there is just ground for the position that it fell with the repeal of the statute under which the transaction was had."

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[1] Biddleson *v.* Whytel, 3 Burr. 1545; State of Louisiana *v.* New Orleans, 109 U. S. 285; O'Brien *v.* Young, 95 N. Y. 428.

[2] 109 U. S. 285.

[3] Steamship Co. *v.* Joliffe, 2 Wall. 450; Louisiana *v.* New Orleans, 109 U. S. 285; Inhabitants of Milford *v.* Commonwealth, 144 Mass. 64; Woods *v.* Ayres, 39 Mich. 345; McCoun *v.* New York Central & Hartford R. R. Co., 50 N. Y. 176.

[4] 2 Wall. 450.

In Inhabitants of Milford *v.* Commonwealth,[1] the court, discussing the nature of the plaintiff's claim for the support of a pauper under a statute imposing upon the Commonwealth an obligation to reimburse the plaintiff for the expenses so incurred, recognizes the distinction between a contract liability and a liability imposed by statute in the following language: —

"The law regards the money as expended at the implied request of the defendant, and a promise to pay the money is said to be implied from the liability created by the statute. A contract may be expressly made, or a contract may be inferred or implied when it is found that there is an agreement of the parties and an intention to create a contract, although that intention has not been expressed in terms of contract; in either case, there is an actual contract. But a contract is sometimes said to be implied when there is no intention to create a contract, and no agreement of parties; but the law has imposed an obligation which is enforced as if it were an obligation arising *ex contractu*. In such a case there is not a contract, and the obligation arises *ex lege*."

Of a quasi-contractual nature, it is submitted, is the duty of a carrier, founded upon the custom of the realm to receive and to carry safely. That the liability in such cases arises, not from contract, but from a duty, is clear.[2] While it is true that the liability is ordinarily described as one in tort, it is submitted that it has been so described because of the usual classification of legal rights into contracts and torts, and that since the obligation imposed upon the carrier is *to act*, the obligation is really quasi-contractual in its nature, and not in the nature of a tort. If this be the proper classification of the duties imposed by law upon a carrier, it must necessarily be true of the common law liability of an innkeeper to receive guests, or to keep their goods safely.[3] The obligation in these cases seems analogous in principle to the obligation imposed by the Austrian law upon one in possession under a *fidei commiss* in favor of his successor, as to the care of the property. That liability is thus described by Lord Justice Cotton in Batthyany *v.* Walford:[4] —

"It appears, as far as I understand the evidence, that the law of Austria (I will omit Hungary, because the Hungarian law on this head is

[1] 144 Mass. 64.

[2] Anonymous, 12 Mod. 3; Marshall *v.* York, N. & B. Railway Co., 11 C. B 655; Austin *v.* Great Western Railway Co., L. R. 2 Q. B. 442, 445.

[3] Morgan *v.* Ravey, 6 H. & N. 265, 275.

[4] 36 Ch. Div. 269, 278.

practically the same as that of Austria) is this: The tenant in possession under a *fidei commiss*, both of real and personal estate, is considered in possession in a different way from that in which a tenant for life or a tenant in tail in England stands. There are no trustees, and if he loses any portion of the personal estate, which apparently stands as regards the provision of the *fidei commiss* nearly in the same position as real estate, he must make that loss good. As regards the real estate, he is answerable, at the time when he surrenders, by death or otherwise, the possession of the property in the *fidei commiss*, for the deterioration of the estate which has taken place since the time when he took possession. He is considered as having possession of the estate, not only for his own benefit, but subject also to an obligation to hand it over to his successor in as good a condition as when he took possession, subject only to this, that he can excuse himself if he shows that the deterioration took place without any fault ('culpa,' as it is called) on his part. But, as I understand the evidence, the claim according to the law of Austria is not in the nature of damages for default, but a claim under an obligation to keep the property in as good condition as the late possessor found it, with liberty to excuse himself from making good the deficiency if he can show that it was not caused by any default of his own. That, in my opinion, is not a claim simply depending on tort, and does not come within the rule of *actio personalis moritur cum persona*. It may be that it is a wrong which has produced the deterioration; but the claim, in my opinion, is one depending on the implied contract or obligation which, by the law of Austria, every possessor under a *fidei commiss* takes upon himself when he enters into possession.

"It was contended that there could be no such liability of a personal representative for anything connected with default, unless there was an express contract. No authority was referred to in support of that proposition, and in my opinion it is contrary to English law. We had to consider this subject in Phillips *v.* Homfray,[1] where minerals had been dug from a neighbor's property, and there Lord Justice Bowen gave a very carefully considered judgment, expressing his own and my views as regards this particular point. What he says is this:[2] 'As regards all actions essentially based on tort, the principle' (*i.e.*, *actio personalis moritur cum persona*) 'was inflexibly applied. There was, however, a species of personal actions to which the rule in question was not extended. These were such as were founded upon some obligation, contract, debt, covenant, or other duty to be performed. If an injury has been done to the personal property of the plaintiff, for relief arising out of which assumpsit could be brought (as in the case of actions against carriers and bailees), the executors of the deceased might well be sued.' That, in my opinion,

[1] 24 Ch. D. 439. [2] 24 Ch. D. 456.

correctly lays down the law. It is not only where there is an express contract that a suit grounded on some default of the person whose representative is sued can be maintained; but if the position of the parties was such that the law of England would imply a contract from that position, then on assumpsit the executor might still be held liable. There are many cases where an action can be brought upon an obligation implied by law in consequence of the position which the parties have undertaken one to another."

Of this nature also, it is submitted, is the obligation of a sheriff to levy execution and pay the proceeds thereof to a judgment creditor.[1]

By far the most important and most numerous illustrations of the scope of quasi-contract are found in those cases where the plaintiff's right to recover rests upon the doctrine that a man shall not be allowed to enrich himself unlawfully at the expense of another.

As the question to be determined is not the defendant's intention, but what in equity and good conscience the defendant ought to do, the liability, while enforced in the action of assumpsit, is plainly of a quasi-contractual, and not contractual nature.

It is on the theory of quasi-contract, founded on the doctrine of unjust enrichment, that an insane man, known to be insane by the party furnishing necessaries, is held liable therefor. That such is the nature of the liability is evident, not only from the fact that he has no contracting mind, but also from the fact that he is equally liable for necessaries furnished at a time when there was no attempt on his part to contract.[2]

In discussing the existence and nature of the obligation incurred by a lunatic for necessaries, Lord Justice Cotton, in Rhodes *v.* Rhodes,[3] thus stated the nature thereof:—

"Now the term 'implied contract' is a most unfortunate expression, because there cannot be a contract by a lunatic. But whenever necessaries are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessaries out of his own property. It is asked, Can there be an implied contract by a person who cannot himself contract in express

[1] Speak *v.* Richards, Hobart, 206, 3 Bl. Com. 163.

[2] *In re* Rhodes, 44 Ch. Div. 94 (*semble*); Sawyer *v.* Lufkin, 56 Me. 308; Sceva *v.* True, 53 N. H. 97.

[3] 44 Ch. Div. 94, 105.

terms? The answer is, that what the law implies on the part of such a person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessaries. I think that the expression 'implied contract' is erroneous and very unfortunate. In one case which was before the Court of Appeal, *In re* Weaver,[1] the question whether there could be what has been called an implied contract by a lunatic, was left undecided by the court, and one of the judges said that it was difficult to see how there could be an implied contract on the part of a lunatic if he was himself incompetent to make an express contract.

"But we all agree with the view that I have thus expressed, in order to prevent any doubt from arising in consequence of our having declined to settle the question in the case to which I have alluded."

Of a quasi-contractual nature also is the obligation of an infant to pay for necessaries. It is usually stated that an infant is bound by his contract for necessaries. But if, as is held in many jurisdictions, the infant is bound to pay for necessaries, not the contract price, but the reasonable value thereof, it would seem clear that he is not liable on his contract. By the terms of his contract he is required to pay a stated sum, and not the reasonable value for necessaries furnished. If he is bound by his contract to pay for necessaries, then of course he should be liable in damages for having, in violation of his contract, refused to pay therefor; and if liable in damages, the amount of the plaintiff's recovery would be determined, not by the reasonable value of the necessaries, but by the price agreed upon, — since had the infant performed his contract, the plaintiff would have received that amount of money. When, therefore, the infant is required to pay, not the stated price, but simply the reasonable value of the necessaries, the obligation differs from that which he assumed; and though the result reached, as to the amount of the recovery, by a plaintiff in any given case, may be the same as would have been reached had the recovery been had on the theory of the plaintiff's being entitled to the price agreed upon, yet such a result is purely accidental. The doctrine, therefore,[2] that while the payee of a note given by an infant for necessaries can recover on the note, he can recover, not the amount thereof, but simply the reasonable value of the necessaries, must be regarded as an anomaly in procedure. In no other way can the result actually reached in some jurisdictions,[3] that while the payee

[1] 21 Ch. Div. 615.

[2] 1 Daniel Neg. Inst., 4th ed., § 226.

[3] 1 Daniel Neg. Inst., 4th ed., § 226.

of the note can recover in the action of a note the value of necessaries furnished, an indorsee thereof has no right of action, be explained.

That the liability is really in quasi-contract seems to be recognized in the jurisdiction which has furnished the leading authority [1] for the proposition that the payee, while not allowed to recover the amount of the note, can, in an action brought on the note, recover the value of the necessaries. In Trainer *v.* Trumbull,[2] where the court held an infant liable for necessaries furnished in the absence of contract, Allen, J., delivering the opinion of the court, said:

"The practical question in this case is, whether the food, clothing, etc., furnished to the defendant were necessaries for which he should be held responsible. This question must be determined by the actual state of the case, and not by appearances. That is to say, an infant who is already well provided for in respect to board, clothing, and other articles suitable for his condition, is not to be held responsible if any one supplies to him other board, clothing, etc., although such person did not know that the infant was already well supplied.[3] So, on the other hand, the mere fact that an infant, as in this case, had a father, mother, and guardian, no one of whom did anything towards his care or support, does not prevent his being bound to pay for that which was actually necessary for him when furnished. The question whether or not the infant made an express promise to pay, is not important. He is held on a promise implied by law, and not, strictly speaking, on his actual promise. The law implies the promise to pay, from the necessity of his situation; just as in the case of a lunatic.[4] In other words, he is liable to pay only what the necessaries were reasonably worth, and not what he may improvidently have agreed to pay for them. If he has made an express promise to pay, or has given a note in payment for necessaries, the real value will be inquired into, and he will be held only for that amount."[5]

Such also, it is submitted, is the nature of a liability of a husband for necessaries furnished a wife whom he has deserted, or compelled to leave him. In such cases it is settled that one furnishing

[1] Earle *v.* Reed, 10 Met. 387.

[2] 141 Mass. 527, 530.

[3] Angel *v.* McLellan, 16 Mass. 28; Swift *v.* Bennett, 10 Cush. 436; Davis *v.* Caldwell, 12 Cush. 512; Barnes *v.* Toye, 13 Q. B. D. 410.

[4] 1 Chit. Con. (11th Am. ed.) 197; Hyman *v.* Cain, 3 Jones (N. C.), 11; Richardson *v.* Strong, 13 Ired. 106; Gay *v.* Ballou, 4 Wend. 403; Epperson *v.* Nugent, 57 Miss. 45, 47.

[5] Earle *v.* Reed, 10 Met. 387; Lock *v.* Smith, 41 N. H. 346; Met. Con. 73, 75.

necessaries can recover against the husband therefor, notwithstanding his knowledge at the time he furnished them that the husband did not intend to pay therefor. It is usually stated that the wife in such cases is authorized to pledge the credit of the husband. Since, however, the husband may be liable for necessaries furnished even though the wife made no attempt to pledge his credit, — as, for example, for necessaries furnished a deserted wife while she is unconscious; — and since, furthermore, the husband is held liable for necessaries furnished a wife while he is incapable of contracting, — as where necessaries are furnished a wife while the husband is insane,[1] — the better form of statement would seem to be simply that an obligation is imposed by law upon the husband to pay for necessaries furnished in such circumstances. That such is the nature of the liability was recognized in Cuningham *v.* Reardon,[2] where Hoar, J., delivering the opinion holding the husband liable for necessaries furnished a wife, said, —

"The husband who by his cruelty compels his wife to leave him is considered by the law as giving her thereby a credit to procure necessaries on his account; and is responsible to any person who may furnish her with them. This responsibility extends not only to supplies furnished her while living, but to decent burial when dead. Its origin is not merely and strictly from the law making her his agent to procure the articles of which she stands in need. If it were so, the consequence would follow for which the defendant contends, that the agency would end with the life of the agent. But it is rather an authority to do for him what law and duty require him to do, and which he neglects or refuses to do for himself; and it is applicable as well to supplies furnished to the wife when she is sick, insensible, or insane, and to the care of her lifeless remains, as to contracts expressly made by her."

On this ground must also be put the obligation of a father, where such obligation is imposed by law,[3] to pay for necessaries furnished a child whom he has refused to support.

That the right to recover money paid under mistake rests upon a quasi-contractual obligation is a self-evident proposition, when it is remembered that in the typical cases where money is recovered as paid under mistake, the mind of the plaintiff as well

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[1] Read *v.* Legard, 6 Ex. 636.

[2] 98 Mass. 538.

[3] Gilley *v.* Gilley, 79 Me. 292; Cromwell *v.* Benjamin, 41 Barb. 558.

as the mind of the defendant was directed, not to the creation of, but to the discharge of, an obligation.

That quasi-contract is the basis of liability where a plaintiff is allowed to sue a tortfeasor in assumpsit is equally clear, since it is the want of assent on the part of the plaintiff that renders the defendant's act tortious. It is idle to speak of the possibility of contract where there is not even the suggestion of a meeting of minds.

That the obligation imposed upon a defendant to refund money obtained by duress, legal or equitable, or upon a judgment subsequently reversed, is quasi-contractual, is evident, since the use of such means to obtain money is utterly inconsistent with an intention to repay it.

Such, of necessity, is the nature of the obligation of a defendant to a plaintiff who has conferred a benefit upon him without request, but in circumstances recognized in law as entitling him to compensation or indemnity therefor.

Such, likewise, must be the nature of the obligation, where though there was a request, and intention to contract, the contract did not come into existence because of the failure of the minds of the parties to meet upon some material term of the contract, or because of the inability of one of the acting parties to make the contract contemplated. Quasi-contractual in its nature necessarily is the obligation of a defendant who, though he has entered into a contract with the plaintiff, and has a perfect defence to any action brought by the plaintiff on the contract, is yet held liable in assumpsit to the plaintiff for value received under the contract.

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